

# **Retransmission of Network Programming Under the Satellite Home Viewer Act: Summary of the PrimeTime 24 Decision**

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## **Retransmission of Network Programming Under the Satellite Home Viewer Act: Summary of the PrimeTime 24 Decision**

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### **Summary**

On May 12, 1998, the Federal District Court in Miami, Florida issued a preliminary injunction, ordering PrimeTime 24, a distributor of satellite television programming services, to terminate the retransmission of network television signals (specifically the programming of the Columbia Broadcasting System (CBS) and Fox television networks) to many of its customers nationwide. The court predicated the issuance of the injunction on its finding that PrimeTime 24 had violated provisions of the Satellite Home Viewer Act, which limit the retransmission of network television signals to customers residing in "unserved households." Because of the number of satellite television subscribers affected and the potential inability of many such customers to receive any network signals after the scheduled termination dates, the court orders have generated considerable attention and questions regarding the need to modify the standards governing the transmission of network signals by satellite carriers.

In an effort to remedy the effect of the court orders and to address other issues related to the satellite transmission of broadcast programming, Congress approved the "Intellectual Property and Communications Omnibus Reform Act of 1999" (S. 1948) on November 19, 1999. Attached by reference to the Consolidated Appropriations Act for Fiscal Year 2000 (H.Rept. 106-479), the Act amends the Satellite Home Viewer Act to provide specific relief to subscribers whose satellite television network service was subject to termination as a result of the injunctions; modified the standards used to determine subscriber eligibility to receive network signals and authorized satellite carriers to provide new programming services to subscribers.

### **Background: The Satellite Home Viewer Act**

The Satellite Home Viewer Act (SHVA) seeks to provide a means by which subscribers to satellite television services may receive network television programming and to establish an efficient mechanism for compensating the copyright owners of such programming for the retransmission of the network signal by satellite carriers. Under the

act, satellite carriers are provided a "compulsory license" to retransmit the programming of network stations to subscribers residing in "unserved households" for private home viewing.<sup>1</sup> The act defines the term "unserved household" as a household that "with respect to a particular television network... cannot receive, through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of grade B intensity (as defined by the Federal Communications Commission) of a primary network station affiliated with that network, and has not, within 90 days before the date on which that household subscribes to receive [the satellite television service]..., subscribed to a cable system that provides the signal of a primary network station affiliated with that network."<sup>2</sup> The Federal Communications Commission's (FCC's) "grade B intensity" standard is an objective measure of the strength of a television station's signal.<sup>3</sup>

To ensure that retransmission of the network station's signal is limited to those households for which such distribution is authorized, the act requires satellite carriers to submit to the network affiliated with the station a list identifying all subscribers to which the retransmission is made.<sup>4</sup> In addition, satellite carriers are prohibited from willfully altering the content of the particular program "or any commercial advertising or station announcement transmitted by the [network station]."<sup>5</sup>

Violations of the act are actionable as an infringement of copyright and subject to the remedies set out in the Copyright Act, including: injunctive relief; actual or statutory damages; attorneys fees; and under certain circumstances, criminal sanctions.<sup>6</sup> In addition, satellite carriers engaging in the "willful or repeated" delivery of network programming to unauthorized subscribers, are subject to permanent injunction, barring the retransmission of any station affiliated with the network and statutory damages of up to \$250,000 for each six month period in which the unauthorized retransmission was made.<sup>7</sup>

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<sup>1</sup>See 17 U.S.C. § 119(a)(2). For more detailed information on the satellite television compulsory licensing scheme, see CRS Report 98-320, *Television Satellite and Cable Retransmission of Broadcast Video Programming Under the Copyright Act's Compulsory Licenses*.

<sup>2</sup>17 U.S.C. § 119(d)(10).

<sup>3</sup>See 47 C.F.R. § 73.683. The FCC's definition sets out field strength values for each channel over which a television signal is transmitted. Thus, for channels 2-6 the strength of a grade B signal is 47dBu, 56 dBu for channels 7-13 and 64 dBu for channels 14-69. *Id.* As a rule of thumb, the agency defines a "grade B contour"--the area over which a grade B signal covers, as "the set of points along which the best 50 percent of the locations should get an acceptable picture at least 90 percent of the time." See *Satellite Delivery of Broadcast Network Signals Under the Satellite Home Viewer Act*, 63 Fed. Reg. 67439 (December 7, 1998).

<sup>4</sup>17 U.S.C. § 119(a)(2)(C). The submissions are required 90 days after commencing retransmission of the network signal. Additional submissions are required on the 15<sup>th</sup> of each month listing any additions or deletions to the subscriber list. *Id.*

<sup>5</sup>17 U.S.C. § 119(a)(4).

<sup>6</sup>17 U.S.C. § 119(a)(5)(A). See also 17 U.S.C. §§ 502-506, 509.

<sup>7</sup>17 U.S.C. § 119(a)(5)(B). Similar remedies are available for violations occurring on a local or regional basis.

The limited license provided satellite carriers to retransmit distant network signals solely to "unserved households" was intended both to facilitate the delivery of network programming to so called "white areas", in which such signals could not be received, and to preserve the exclusive program distribution arrangements between the television networks and their affiliate stations.<sup>8</sup> The exclusive right to deliver network programming in the local market is particularly important to the continued financial viability of the local affiliate, which derives a substantial portion of its revenue from the sale of commercial spots on such programming. As the price of a commercial spot is dependent upon the size of the program audience, the importation of a duplicate network signal into the local market reduces the affiliate's audience, and consequently, the value of the time to be sold to advertisers.

### **Primetime 24's Delivery of Network Signals and the District Court's Decision**

At issue in the *PrimeTime 24* litigation was the validity of PrimeTime 24's delivery of network programming to satellite subscribers and whether the satellite carrier's retransmissions exceeded the limited license granted under the act.<sup>9</sup> PrimeTime 24 retransmitted the programming of an affiliate of each of the television networks to satellite subscribers nationwide.<sup>10</sup> In its attempt to comply with the "unserved household" limitation in SHVA, PrimeTime 24 required its distributors to ensure that its services were provided only to eligible subscribers; however, the carrier did not independently verify whether such subscribers were able to receive a signal of grade B intensity. Rather, service was provided based on the prospective subscriber's responses to a PrimeTime 24 questionnaire.<sup>11</sup>

In bringing its copyright infringement action, CBS and Fox asserted that PrimeTime 24 failed to adequately ensure that its retransmissions were limited to subscribers unable to receive a grade B signal; and as a result, provided service to a number of households which were not "unserved households" as defined in the act.<sup>12</sup> Specifically, the networks claimed that PrimeTime 24 accorded too much weight, in making service decisions, to subscriber assessments of the picture quality received from over the air signals, while failing to conduct its own investigation of the subscriber's over the air signal strength or the location of the household to determine whether a grade B signal could likely be received under the objective standards set out by the FCC. According to the networks, PrimeTime 24's failure to limit its retransmissions to "unserved households" caused a

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<sup>8</sup>See H.Rept. 100- 887 (II), 100<sup>th</sup> Cong., 2d Sess. 19-20 (1988).

<sup>9</sup>See *CBS, Inc. v. PrimeTime 24 Joint Venture*, 9 F. Supp. 2d 1333 (S. Dist. FL 1998).

<sup>10</sup>Specifically, Primetime 24 offers network programming through the provision of three service packages: PrimeTime East, consisting of programming from a CBS, ABC and NBC affiliate on the east coast; PrimeTime West, comprising network affiliates on the west coast and Foxnet, which offers programming from the Fox network. Subscribers may purchase all three of the service packages. 9 F. Supp. 2d at 1336.

<sup>11</sup>The questionnaire inquired into whether the subscriber intends to use the programming for residential use; whether the subscriber has subscribed to cable in the last 90 days and whether the subscriber receives an acceptable signal over the air. *Id.*

<sup>12</sup>*Id.* at 1338.

reduction in the viewing audience for local affiliated programming and consequently a loss of advertising revenue to its local affiliates.<sup>13</sup>

In defense of its actions, PrimeTime 24 maintained that its consideration of a potential subscriber's picture quality, in determining whether to provide service was consistent with congressional intent in enacting the SHVA. According to the satellite carrier, Congress enacted the Satellite Home Viewer Act to provide clear reception of network signals to viewers unable to receive such signals.<sup>14</sup> In addition, PrimeTime 24 argued that FCC regulations do not adequately define a grade B signal for purposes of the SHVA; that typography maps and signal strength tests used to support the network claims were unreliable; and that its actions did not amount to a "willful and repeated" violation of the act.<sup>15</sup>

In granting the injunction, the court rejected the notion that Congress' primary intent was to base the provision of service on existing picture quality, noting that the statutory language does not discuss clear reception and expressly adopts the FCC's objective definition of a grade B signal to determine whether a household is an "unserved household."<sup>16</sup> In addition, the court found that the legislative history indicated that Congress considered and rejected a proposal to tie the provision of network programming to subjective subscriber assessments of over the air signal quality.<sup>17</sup> Similarly, the court concluded that the FCC's objective standard, although inexact in estimating the presence of a grade B signal in individual households, was specifically endorsed by Congress in the statutory language and as indicated in the legislative history.<sup>18</sup> With regard to whether PrimeTime 24's actions constituted a "willful and repeated" violation of the act, the court cited evidence demonstrating that the satellite carrier "knew of the governing legal standard, but simply chose to ignore it."<sup>19</sup>

The court's preliminary injunction required PrimeTime 24 to terminate its delivery of CBS and Fox programming to subscribers, not residing in "unserved households," who signed up for the satellite service after March 11, 1997, the date the action was originally filed. While service termination was to take effect, originally, no later than October 8, 1998, the court delayed enforcement of the order until February 28, 1999, pursuant to an agreement between the parties, to await the conclusion of a FCC proceeding to modify the definition of a grade B signal for purposes of the SHVA.

In addition to CBS and Fox's lawsuit, other actions were brought against PrimeTime 24, alleging violations of the Satellite Home Viewer Act by the carrier. On August 19, 1998, the American Broadcasting Company (ABC) obtained a permanent injunction, barring PrimeTime 24 from retransmitting the signal of any ABC affiliate into the local

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<sup>13</sup>*Id.*

<sup>14</sup>*Id.* at 1338.

<sup>15</sup>9 F. Supp. 2d at 1339-43.

<sup>16</sup>*Id.* at 1339.

<sup>17</sup>*Id.*

<sup>18</sup>*Id.* at 1340.

<sup>19</sup>*Id.* at 1343-44.

market of WTVD--the network's Raleigh-Durham, North Carolina affiliate.<sup>20</sup> In addition, the four major television networks brought an action against EchoStar Communications alleging similar SHVA violations by that satellite carrier.<sup>21</sup>

## Subsequent Developments

### Permanent Injunction Issued Against PrimeTime 24 by Miami Court

On December 30, 1998, the Federal District Court in Miami issued a permanent injunction against PrimeTime 24, ordering the carrier to terminate its provision of CBS or Fox programming to "any customer that does not live in an 'unserved household,'" unless it obtains prior written consent to provide such service from the affected local network affiliates or provides the stations with copies of signal intensity tests "showing that the household cannot receive an over the air signal of grade B intensity... from any station of the relevant network."<sup>22</sup> In obtaining the written consent, PrimeTime 24 was required to seek authorization from each "television station of the relevant network that is predicted... to deliver a signal of at least grade B intensity to that household."<sup>23</sup> In addition, the carrier was required to give affected stations 15 days advance notice, prior to conducting any signal intensity testing. The court's order required PrimeTime 24 to terminate the service of customers, who subscribed to the service prior to March 11, 1997, no later than April 30, 1999.<sup>24</sup> Subscribers who signed up to receive service after March 11, 1997 remained subject to the February 28, 1999 termination date set out in the court's earlier preliminary injunction.

### Legislative Action: The Intellectual Property and Communications Omnibus Reform Act of 1999

Partly in response to the injunctions issued against PrimeTime 24, Congress enacted the "Intellectual Property and Communications Omnibus Reform Act of 1999."<sup>25</sup> Adopted as part of the Consolidated Appropriations Act for Fiscal Year 2000,<sup>26</sup> the Act amends SHVA to, among other things, provide relief to subscribers whose network signals were

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<sup>20</sup>See *ABC, Inc. v. PrimeTime 24 Joint Venture*, 17 F. Supp. 2d 478 (M.D.N.C. 1998). A similar lawsuit against Primetime 24, filed by an Amarillo, Texas affiliate of the National Broadcasting Company (NBC), is pending before a Federal District Court in Texas.. See *Kannan Communications, Inc. v. Primetime 24 Joint Venture*, No. 2-96-CV-086 (N.D. Tex.).

<sup>21</sup>See *Communications Daily*, vol. 18, no. 216 at p. 9 (November 9, 1998).

<sup>22</sup>See *CBS, Inc. v. PrimeTime 24 Joint Venture*, 1998 U.S. Dist. LEXIS 20488 (S.D. Fl. December 30, 1998).

<sup>23</sup>*Id.*

<sup>24</sup>Prior to terminating its delivery of CBS and Fox programming, PrimeTime 24 was required to give each subscriber 45 days notice. *Id.*

<sup>25</sup>Note also that the scheduled sunset of SHVA on December 31, 1999 served as additional motivation for congressional action.

<sup>26</sup>The bill--S.1948, was a revised version of the proposal that emerged from Conference Committee. The measure was attached as a rider to the FY2000 appropriations bill.

subject to termination as a result of the litigation.<sup>27</sup> Section 1005 provides a moratorium on copyright liability, permitting subscribers who receive a Grade B signal, and either (a) whose “satellite delivered network signal was terminated after July 11, 1998 and before October 31, 1999” or (b) [who] “received such service on October 31, 1999” to remain eligible to receive such signals until December 31, 2004.

In addition, the Act broadens the category of subscribers eligible to receive distant network signals. While the Act retains the limited authorization to retransmit such programming only to “unserved households”, the term “unserved household” was expanded to include subscribers in addition to those previously made eligible under SHVA. The term now includes subscribers who cannot receive an over-the-air Grade B signal, as defined by FCC rules in effect January 1, 1999; recreational vehicles and commercial trucks; C-band satellite subscribers; and subscribers receiving a waiver from the network station. Satellite carriers are limited to retransmitting the distant signal of no more than two network stations for each of the television networks to subscribers residing in “unserved households,” and may provide such signals in addition to the retransmission of local network affiliates.<sup>28</sup>

The Act directs the FCC to promulgate rules applying “network nonduplication protection; syndicated exclusivity protection and sports blackout protection” to the retransmission of nationally distributed superstations; and to apply sports blackout protection to the retransmission of network stations, “to the extent technically feasible and not economically prohibitive.”<sup>29</sup> In addition, the Commission is authorized to evaluate, within one year of the date of enactment, alternative standards for determining subscriber eligibility to receive a distant network signal and to recommend modifications to its Grade B standard or the adoption of an alternative standard. Moreover, the Act requires the FCC to promulgate rules to establish a “point-to-point” predictive model for determining an individual subscriber’s ability to receive an over-the-air Grade B signal.

The Act also authorizes the retransmission of local network stations into the local market by satellite carriers and imposes mandatory signal carriage (“must carry”) and retransmission consent requirements on carrier “local-into-local” service offerings.<sup>30</sup>

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<sup>27</sup> See H.Rept. 106-479, § 1000(a)(9).

<sup>28</sup> Satellite carriers found to have “knowingly and willfully” violated the distant signal limitations are subject to a forfeiture penalty of 50,000 dollars for each violation. See § 1008(a).

<sup>29</sup> The FCC’s existing network nonduplication, syndicated exclusivity and sports blackout rules prohibit the distant retransmission by cable operators of network programming, syndicated programming and programming of sporting events, respectively, where such programming is carried by a television station in the local market. The rules effectively provide exclusive rights to local television stations with respect to the transmission of such programs. See generally, 47 C.F.R. Part 76, subpart F; 47 C.F.R. § 76.67.

<sup>30</sup> For a more detailed discussion of provisions governing “local-into-local”; “must carry” and retransmission consent, as well as a general overview of the legislation, see CRS Report 98-942, *Satellite Delivered Television: Issues Concerning Consumer Access to Broadcast Network Television Via Satellite*.

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